

mean, it's a substantial action -- is preempted state law, just like they did in the Zoning Act.

MR. AMES: I just don't think it's that simple, because under the supremacy clause it's one thing to say that we have a rule and it is going to -- it's going to overcome your specific enactment. But when private parties enter into an agreement, just because it's enforceable under state law doesn't mean that the same analysis ought to apply.

What you're essentially saying is preemption applies to any -- any legal relationship, and --

THE COURT: Right. That's exactly what I'm saying.

MR. AMES: Yes. And I guess that -- I don't think that the supremacy clause allows that. The supremacy clause doesn't --

THE COURT: Well, take a look at the Supreme Court's opinion in Norfolk and Western, and I think you're going to find that -- that you're mistaken on that.

MR. AMES: Okay.

THE COURT: Let me ask you about the rent control cases here. You seem to try to distinguish Yee on the ground that it did not involve a new

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1 tenant.

2 MR. AMES: Right.

3 THE COURT: Is that your ultimate
4 position?

5 MR. AMES: There was no new occupancy.

6 THE COURT: All right. So your position,
7 then, is that if a rent control statute applied to a
8 new tenant, it would be unconstitutional?

9 MR. AMES: I'm not sure that that's --

10 THE COURT: In other words, let's say the
11 state has a rule, city has a rule, that says you can
12 only rent these apartments at \$100 a month, regardless
13 of -- there's not a grandfather for existing tenants.
14 It's for any tenant. Which is the normal rent control
15 statute. Is your position that that's an
16 unconstitutional taking without compensation? Per se,
17 it's a per se taking.

18 MR. AMES: I'm not -- I'm sorry. I'm not
19 following the question.

20 THE COURT: Okay.

21 MR. AMES: You're saying if I -- if the
22 rent control statute says that we can't bring in
23 another tenant at the --

24 THE COURT: No. The rent control statute
25 just says you can only rent your apartment at \$100 a

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1 month. New tenants, old tenants, doesn't matter.

2 MR. AMES: Okay.

3 THE COURT: Only \$100 a month. You have
4 a lease that says you -- you have a standard lease,
5 which says, "I'm willing to rent you my apartment if
6 you pay me \$200 a month," and the statute says you can
7 only do \$100 a month.

8 MR. AMES: No, we're not challenging rent
9 control. And we're not challenging that situation.

10 THE COURT: All right. Then, why are you
11 saying --

12 MR. AMES: What we're -- the problem --

13 THE COURT: Let me just -- what I'm trying
14 to do is figure out, if we adopt your position, what
15 other dominos fall down? Doesn't that permit a person
16 to occupy your apartment who you do not want? Namely,
17 a person --

18 MR. AMES: Yes, it does.

19 THE COURT: -- who will not pay you \$200.

20 MR. AMES: Yes, it does.

21 THE COURT: And that is a physical
22 occupation of your apartment, isn't it?

23 MR. AMES: Well, it might be. The Court
24 -- well, it depends on what you mean by "physical
25 occupation," and, of course, Loretto, as we said,

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1 talks about a permanent physical occupation.

2 THE COURT: Right.

3 MR. AMES: Now, I don't have a case that
4 says that is what I'm saying. So --

5 THE COURT: But by "permanent," it meant
6 -- I mean, they explained what they meant. They meant
7 that as long as the cable company wanted to keep it
8 there, right, as long as the lease continued, it had
9 to continue.

10 So if I -- if you -- you can't throw me
11 out ever because I won't pay you \$100 -- more than
12 \$100 a month. That's a permanent physical occupation.
13 You own the air in my apartment, don't you?

14 So it's not different whether it's the --
15 although it's true that typically leases permit all
16 types of things that don't involve attachment and may
17 have rules about attachment that are different. The
18 fact is, you own my cubicle, right?

19 MR. AMES: Right.

20 THE COURT: All right. So this permits an
21 unwanted physical occupation by a person who you do
22 not -- who you don't want, right? I don't understand
23 why you don't think that's unconstitutional if you
24 think that this is unconstitutional.

25 MR. AMES: Well, I don't think it's

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1 unconstitutional because the Supreme Court has said
2 that it isn't.

3 THE COURT: Right. So how do we draw the
4 line? How do we --

5 MR. AMES: And what we're saying here is
6 that when I have retained a specific property right --
7 namely, the right to attach a certain wire, an antenna
8 -- and I have kept that for myself, and then the
9 government says, "You have to take that property right
10 and transfer it to the tenant" --

11 THE COURT: Right. No, I got that. But
12 my question is, what about retaining a property right
13 that says, "Nobody violates my space unless they pay
14 me \$200," or that says, "I'll let one person in my
15 space but not two"? Why is that different?

16 MR. AMES: Well, because that's -- I guess
17 it comes back -- we don't really know what -- I mean,
18 the Court has apparently held that those are not
19 physical takings.

20 THE COURT: You think Loretto has
21 something to do with whether it's an animate or
22 inanimate object. Is that the point?

23 MR. AMES: I think I have to -- that's
24 what it comes down to.

25 THE COURT: As compared to what Judge

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1 Randolph was suggesting, which is the distinction is
2 between second and third parties, which are the words
3 the case used.

4 MR. AMES: Right. Yes. No, I think --

5 THE COURT: There's no language in Loretto
6 that says this is a --

7 MR. AMES: I don't think that you can make
8 a distinction -- I mean, for example, if I have a
9 piece of property, and I -- it's a large area, and I
10 lease it to somebody, and then the government, for
11 whatever policy reasons, decides that they want to
12 encourage people to build pipelines, and then my
13 tenant, under this policy or this statute, allows a
14 pipeline to be built, or he participates in the
15 building of this pipeline, and, you know, over my
16 objections, I think when you look at it in terms of
17 scale then I think you start to recognize that, well,
18 that -- you know, just because I -- the Commission's
19 position basically is that if I lease property, I can
20 never have a per se physical taking.

21 THE COURT: All right. Let me ask you
22 another --

23 THE COURT: The whole law of takings is
24 filled with examples of this far and no further. All
25 the way. And I think Justice Holmes recognized as

1 much in the Keystone Bituminous Coal case in the very
2 early beginning.

3 And I must admit, and I -- to the extent
4 that you're saying it, I must admit that a lot of the
5 lines the Supreme Court has drawn are difficult to
6 reconcile. There's no question about that. I mean,
7 with physical occupation, and so on and so forth.

8 So I'm not sure how helpful all of these
9 counter examples are in terms of an analysis, because
10 they don't give us a rule. It's kind of a -- it's an
11 irresistible -- your pipeline is an irresistible
12 counter example to the government's position. The
13 government's example of the fire extinguisher is an
14 irresistible counter example to yours. Neither one of
15 these gives us any legal analysis.

16 MR. AMES: I understand, Your Honor.
17 There's no question it's a problem, and I guess that
18 that leads us back to, for better or for worse, to
19 Bell Atlantic, in the sense that -- or some policy
20 along those lines, in the sense that, the
21 Congressional Review Act aside, I don't -- we can't
22 have a situation where the Commission can take
23 advantage of this sort of ambiguity and just adopt
24 rules that have this kind of invasive effect.

25 THE COURT: Let me ask you just one more

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1 question here. Let's say we were to decide the way
2 you would like, and we would -- and say that they
3 can't require that you permit a tenant to put in a
4 satellite dish. And then you use that as an economic
5 leverage issue to charge; that is, you say, "Okay.
6 Now this is our bundle of rights, but we will permit
7 it at \$100 a year." Could the FCC now have a
8 regulation that says if you permit satellite dishes in
9 your house, it must be \$1 a year?

10 MR. AMES: Only if Congress gives them
11 that authority, which they don't have.

12 THE COURT: I'm only on the
13 constitutional.

14 MR. AMES: I understand. But I want to be
15 clear because we haven't --

16 THE COURT: Please. I understand that
17 you're not --

18 MR. AMES: Okay.

19 THE COURT: -- giving up your argument by
20 answering my hypothetical. But you agree that's not
21 an unconstitutional taking, then, right?

22 MR. AMES: It would be a rate regulation.

23 THE COURT: Right. So now let's say you
24 also -- let's say you allowed satellite master TV in,
25 including the wires into the house, and they issued a

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1 regulation that says you can't discriminate between
2 satellite master TV and satellite dishes.

3 So that if you allow a cable company to do
4 the satellite master, you have to allow an individual
5 to put in a satellite dish.

6 MR. AMES: Right.

7 THE COURT: Constitutional, right? Not a
8 per se taking. I'm sorry. Let me put it that way.

9 MR. AMES: Not a per se taking. Well,
10 we're still talking about physical attachment.

11 THE COURT: Yes. I'm talking about
12 physical attachment in both situations. That is, you
13 allow -- I mean, I take it the underlying economics
14 are nothing to be ashamed of, which is who gets the
15 leverage here, right?

16 And one thing that you would like is
17 either, I assume, the ability to charge for this --
18 somebody taking the extra bundle of -- extra stick
19 from the bundle of putting in a satellite dish, or to
20 charge a master -- a satellite master company from
21 putting -- to put something on your roof, and the
22 wires going into the tenant's apartment, right?

23 MR. AMES: Well, yes. Yes. I mean,
24 except that I don't -- there's too much emphasis in
25 your hypothetical I think in terms of our concern with

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1 being able to charge for this right.

2 THE COURT: I don't care about -- you
3 know, this is in no way judgmental about this.

4 MR. AMES: Okay.

5 THE COURT: So, but let me just -- assume
6 that some -- not you personally, but some landlord
7 will say, "Okay. Now, you can't take this right away
8 from me. So now I'm going to charge for this right,
9 and I'm going to charge for it in any of a number of
10 ways. One way is to rent out my roof and then attach
11 wires. Another way is to say to my tenants, 'You can
12 have satellite dishes, but only if you pay me. Or you
13 can have satellite dishes only if you use my
14 company,' or, you know, any of a dozen things.

15 Could the FCC have a rule that says, "This
16 building has to be either nothing, or if you allow any
17 connections to the house -- to the room, we are
18 regulating the rate at \$1"?

19 MR. AMES: I think they could.

20 THE COURT: They could.

21 THE COURT: Thank you very much.

22 MR. AMES: Thank you.

23 ORAL ARGUMENT OF GREGORY M. CHRISTOPHER, COUNSEL

24 ON BEHALF OF RESPONDENTS

25 May it please the Court, good morning. My

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1 name is Gregory Christopher, Counsel for the Federal
2 Communications Commission.

3 Your Honors, I invite the Court to
4 rearrange my agenda, but it is my present intention to
5 discuss the constitutional issues in a few moments,
6 time permitting.

7 I think the -- honestly, the more
8 difficult issues are raised by the two statutory
9 authority issues. Did the Commission have the
10 authority to promulgate Section 1.4000, the OTARD
11 rule? And, if so, did it abuse that authority? Was
12 it an arbitrary and capricious rulemaking for it to
13 exercise that authority?

14 Your Honors --

15 THE COURT: I must say I'm -- I was -- I'm
16 baffled by your brief. I don't --

17 MR. CHRISTOPHER: I'm sorry, sir.

18 THE COURT: I don't understand. I hope
19 you're going to explain. Is that what you're going to
20 explain now?

21 MR. CHRISTOPHER: I hope I will, sir.
22 Because I -- it's really not a very difficult issue.
23 Let me suggest this.

24 THE COURT: I thought you just said it was
25 a difficult issue.

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1 MR. CHRISTOPHER: No, I said it was a more
2 troublesome issue, but I didn't say it was a difficult
3 issue.

4 THE COURT: It's the part on page 15,
5 beginning on 15, that I don't --

6 MR. CHRISTOPHER: All right. Let me --
7 rather than going through my brief, Your Honor, may I
8 just -- I believe I can explain the statutory
9 authority here rather easily, because unfortunately --
10 and I guess I will agree with Your Honor that this
11 case was not briefed as well as perhaps it might have
12 been.

13 Let me suggest this to the Court. The
14 reason that this case seems more difficult than it is
15 is because the Court has been asked -- and we're to
16 blame for this to an extent -- to decide whether or
17 not Section 303 gives the Commission the statutory
18 authority to do what it did.

19 And the answer is, by itself maybe.
20 Maybe. But there are two statutes involved here, two
21 very different kinds of statutes. You have a statute
22 303, and it's --

23 THE COURT: Well, why isn't Section -- I
24 guess let's skip the bottom --

25 THE COURT: Can he just finish his answer?

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1 MR. CHRISTOPHER: All right. Because it's
2 very important, Judge Garland, and this is really the
3 heart of our case. That you have two different kinds
4 of statutes at work here. The one kind of statute,
5 the 303 statute, which is an unfocused, broad grant of
6 authority to the FCC to take any and all acts, or pass
7 any and all regulations, necessary for the execution
8 of its functions and to carry out the provisions of
9 the Act.

10 Well, what does that mean? It doesn't
11 mean much of anything, and that's why the cases that
12 they cite are -- they are cases that assess whether or
13 not the Commission's ancillary, unfocused authority
14 gives it the authority, the right, to do what it
15 proposes to do.

16 That's not this case, because in this case
17 you've got Section 207, which is a different kind of
18 statute. It's not a grant of authority, but it tells
19 the Commission, "Use your authority" --

20 THE COURT: Why isn't it a grant of
21 authority?

22 MR. CHRISTOPHER: Sorry?

23 THE COURT: Why isn't it a grant of
24 authority?

25 MR. CHRISTOPHER: Because the statute

1 itself says, "Do this pursuant to 303 of the Act." It
2 could have been a grant of authority, if it hadn't put
3 that phrase in there.

4 THE COURT: 303 of the Act is just -- at
5 least one section is just the one that says you can
6 issue or promulgate regulations, like you say,
7 necessary to --

8 MR. CHRISTOPHER: You can promulgate
9 regulations to carry out the purposes of the Act, and
10 that's why -- then you look, all right, what are the
11 purposes of the Act? 207 tells what the purposes of
12 -- tells what one of the purposes of the Act is. One
13 of the purposes of the Act, from this moment forward,
14 is to eliminate old -- excuse me -- to eliminate
15 restrictions on a viewer's ability to receive video
16 programming.

17 THE COURT: That sounds --

18 MR. CHRISTOPHER: So now we know --

19 THE COURT: Maybe it's semantic, but I
20 don't understand your answer to Judge Randolph's
21 question.

22 MR. CHRISTOPHER: The answer is --

23 THE COURT: Why isn't that authority?

24 MR. CHRISTOPHER: Excuse me, sir?

25 THE COURT: Why isn't that authority? It

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1 sounds like authority.

2 MR. CHRISTOPHER: It is semantic. It's
3 almost metaphysical, and I'm sorry to make this more
4 difficult than perhaps it needs to be.

5 THE COURT: This is worse than a child
6 versus a satellite dish.

7 THE COURT: Is your hang up --

8 MR. CHRISTOPHER: You have two satellites
9 -- two satellites -- two statutes working in tandem.
10 One is -- I like this analogy. One, if you will, is
11 the keys to the car, the other is the road map,
12 neither one of which are really much use without the
13 other. 303 is the keys to the car. It allows you to
14 start the engine, but you don't know where to go. 303
15 tells you where to go -- 207 tells you where to go.

16 THE COURT: Big deal. I mean, we see
17 legislation all the time that says, "Promulgate
18 regulations pursuant to your regulatory authority to
19 do X, Y, and Z."

20 MR. CHRISTOPHER: Okay. I guess I'm
21 arguing against it, and I shouldn't be.

22 THE COURT: I've never seen a case of, is
23 that new authority, is that old authority, how do
24 they -- if Congress wanted you to promulgate these
25 regulations --

1 MR. CHRISTOPHER: Your Honor, I would be
2 very happy to simply say if the Court wishes to view
3 207 as a grant of authority sufficient to justify the
4 Commission's rule, I am certainly not going to quarrel
5 with that.

6 THE COURT: -- and that do it within 180
7 days. Are you somehow concerned that since you didn't
8 do it within 180 days your authority expired?

9 MR. CHRISTOPHER: No, not at all. Because
10 it doesn't say you must do this with -- you must do
11 this within 180 days, and then your authority expires.
12 We did act within 180 days. We went -- we did extend
13 the rule to owner-operated property, but then we
14 looked at the rule and we said, "Now, should we stop
15 here?"

16 And as we explained in our Order, we took
17 cognizance of the fact that somewhere between a fourth
18 and a third of the people in this country live in
19 rental properties. And so we thought to ourselves,
20 well, is it likely that Congress wanted us to stop
21 here? I mean, is there anything in these legislative
22 histories or anything on the face of the statute that
23 would have said, "Stop here and don't incorporate the
24 rest of this huge part of the American population"?

25 And so we said --

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1 THE COURT: I guess I just need to be
2 clear as to what you see as the down side of the
3 Commission taking the view that 207 gives it the
4 authority.

5 MR. CHRISTOPHER: No down side, Your
6 Honor.

7 THE COURT: All right.

8 MR. CHRISTOPHER: I think maybe this is
9 just bad lawyering, I'm afraid.

10 THE COURT: All right.

11 MR. CHRISTOPHER: Maybe I -- we should
12 have said that. But I -- honestly, as an appellate
13 lawyer, I thought that that phrase within 207 that we
14 shall do certain things pursuant to 303, in my
15 experience that told me that 207 was not meant to be
16 a grant of authority. It was meant to inform the
17 authority. It was meant to focus --

18 THE COURT: All right.

19 MR. CHRISTOPHER: -- other authority.

20 THE COURT: Is it the Commission's
21 position that even if 207 gave you the authority to
22 take property that you, nevertheless -- that you
23 should do that, that Congress did not intend to cut
24 off your authority on the basis of whether it's a
25 taking or not a taking? And if the landlord has a

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1 problem, it can just go to the Claims Court and
2 recover.

3 MR. CHRISTOPHER: Do I understand, Your
4 Honor, that we're now in the takings issues? Because
5 I don't think I --

6 THE COURT: Now we're in the question of
7 statutory interpretation. Before we get to the
8 question whether there's been a taking, or this would
9 threaten a taking, or whatever, there's a subsidiary
10 question. The subsidiary question is, how you
11 construe your -- the statute under which you're
12 operating.

13 So if we assume it's 207 --

14 MR. CHRISTOPHER: Right.

15 THE COURT: -- is there a gloss on 207
16 that you have to -- that -- it says "eliminate all
17 restrictions"?

18 MR. CHRISTOPHER: Right.

19 THE COURT: Except in doing that don't
20 take property.

21 MR. CHRISTOPHER: I think that that's now
22 where you get into your favorite case, the Bell
23 Atlantic case, Your Honor. I think that the
24 Commission is under -- if we're going to say that Bell
25 Atlantic is still a good law, and I understand your

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1 court's concern about that, I think the Commission is
2 under an obligation to avoid construing a statute such
3 as to create a taking, because then you do open up the
4 door to a raid on the public fisc.

5 And I think that's what Bell Atlantic is
6 all about. But Bell Atlantic doesn't apply in this
7 case because the way the Commission has interpreted
8 the statute, or, indeed -- or even on the face of the
9 statute, there is no taking.

10 THE COURT: Well, Judge Garland raised a
11 good point. I'm not even sure that the premise is
12 correct that you'd open yourself up -- or open the
13 federal government up to a raid on the public fisc.

14 MR. CHRISTOPHER: Not at all, because
15 they're no taking

16 THE COURT: Because the landlord could
17 charge for -- for installing -- or having an antenna,
18 right? It would be an extra five bucks on your
19 monthly rent.

20 MR. CHRISTOPHER: Well, I'm not sure I
21 can --

22 THE COURT: And if you have a problem with
23 that, call the FCC.

24 MR. CHRISTOPHER: I -- well, I want to
25 make sure the Court understands how this rule works,

1 Your Honor. The rule forbids restrictions which would
2 interfere with the ability of a viewer to receive
3 satellite-delivered programming. And among the things
4 that the Commission specifically talked about is
5 unreasonable costs.

6 So this becomes kind of a fact-based
7 situation. If the landlord were to say, "Okay. We're
8 going to charge you \$100 a year," that might pass
9 muster. I mean, I don't know. That case has never
10 come to the FCC, and I don't have any opinion as to
11 whether it would, but that would I guess have to
12 depend on -- the landlord would have to show, well,
13 what are his costs. There has to be a reasonable
14 relationship between the costs that he's passing on --

15 THE COURT: Who adjudicates all of these
16 landlord/tenant disputes about --

17 MR. CHRISTOPHER: Under the statute, under
18 the rules, Your Honor, it can go to two places. The
19 landlord or the tenant can come to the FCC and get a
20 declaratory ruling, or they are entitled to go to a
21 local court.

22 THE COURT: Unbelievable. Okay.

23 MR. CHRISTOPHER: All right.

24 THE COURT: There's nothing to prevent a
25 landlord from raising his rents to reflect the fact

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1 that he now has a building that --

2 MR. CHRISTOPHER: Not --

3 THE COURT: -- has TV in it, and,

4 therefore, it's more economically --

5 MR. CHRISTOPHER: That is correct, Your

6 Honor.

7 THE COURT: All right.

8 MR. CHRISTOPHER: There's nothing to

9 prevent that.

10 THE COURT: Right.

11 THE COURT: If it's a valuable right that

12 the landlord is losing, then the landlord can recover

13 that valuable right through increased rent, right?

14 MR. CHRISTOPHER: I think that's right.

15 The underlying word has to be "reasonable." The costs

16 and the -- the costs, the impairment, the

17 prohibitions, whatever the landlord does has to be

18 reasonable.

19 THE COURT: But this doesn't -- this only

20 goes to the regulatory takings analysis, right?

21 MR. CHRISTOPHER: That's right. So --

22 THE COURT: If this is a physical

23 occupation and a physical per se taking, the

24 Commission agrees that that's not covered by 207.

25 MR. CHRISTOPHER: Your Honor, Judge

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1 Garland, with all due respect, I think that you have
2 ignored a crucial part of the law of per se takings
3 which was identified by Judge Randolph. In order to
4 find a per se taking, you must not merely have a
5 permanent physical occupation, you must have a
6 permanent physical occupation affected by an
7 interloper with a government license.

8 THE COURT: I got the point. I didn't --
9 I'm not --

10 MR. CHRISTOPHER: It's a major point, sir,
11 because he --

12 THE COURT: Hold on for one second.

13 MR. CHRISTOPHER: Yes, sir.

14 THE COURT: With all of your additions to
15 it, and you're not -- and I don't think you're
16 understanding my question -- I understood the FCC's
17 opinion as saying that if this were regarded as a
18 taking under Loretto --

19 MR. CHRISTOPHER: Yes.

20 THE COURT: -- then we would not have
21 authority under 207. But this is not a taking under
22 Loretto.

23 MR. CHRISTOPHER: Correct. That's right.

24 THE COURT: That's right?

25 MR. CHRISTOPHER: That's correct, sir.

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1 THE COURT: If this were regarded as a
2 taking under Penn Central --

3 MR. CHRISTOPHER: Yes, sir.

4 THE COURT: -- then we would have
5 authority, because it's not a per se physical taking.
6 Your counsel there is nodding. Isn't that -- that's
7 what it says in this opinion.

8 MR. CHRISTOPHER: Well, yes. All right.
9 Then the answer is yes. I don't remember that exact
10 language, because now we're getting back into the Bell
11 Atlantic line of -- not line but --

12 THE COURT: But Bell Atlantic says if it
13 is necessarily --

14 MR. CHRISTOPHER: Right.

15 THE COURT: -- a Loretto taking, right?

16 MR. CHRISTOPHER: I think it's if there's
17 necessarily a taking. I think, Your Honor, it could
18 be -- if there's necessarily a regulatory taking, I
19 think we might --

20 THE COURT: Yes. If it's --

21 MR. CHRISTOPHER: -- be in the same place.

22 THE COURT: Right. But a regulatory
23 taking is not necessarily, right?

24 MR. CHRISTOPHER: By definition, you're
25 right, it's a fact-based --

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1 THE COURT: That depends on the facts,
2 right?

3 MR. CHRISTOPHER: That's correct.

4 THE COURT: So it has a per se taking.

5 MR. CHRISTOPHER: Okay.

6 THE COURT: Right?

7 MR. CHRISTOPHER: Yes.

8 THE COURT: So Loretto says, as do these
9 other cases -- the other case that Judge Randolph
10 mentioned that Loretto is based on --

11 MR. CHRISTOPHER: Right.

12 THE COURT: -- if there is a class which
13 is necessarily a taking --

14 MR. CHRISTOPHER: Right.

15 THE COURT: -- then we won't construe the
16 statute as permitting that.

17 MR. CHRISTOPHER: Right.

18 THE COURT: Right? We won't unless it's
19 explicit.

20 MR. CHRISTOPHER: That's correct.

21 THE COURT: But there has to -- in order
22 to get to this construction rule, there has to
23 necessarily be a class.

24 MR. CHRISTOPHER: I see what you're
25 saying. You're right. I did misconstrue your

1 question.

2 THE COURT: You're resisting me --

3 MR. CHRISTOPHER: Yes, Your Honor.

4 THE COURT: -- for no reason.

5 MR. CHRISTOPHER: You're absolutely right.

6 No. The Commission does understand that there may be

7 individual instances in which there is a particular

8 case which could create a regulatory taking. And in

9 that case, the landlord does have his remedy, it's I

10 guess under the Tucker Act, to go to the Court of

11 Claims and show how in this particular instance the

12 rule affected a taking.

13 But that doesn't invalidate the statute,

14 and it doesn't undercut the Commission's authority to

15 promulgate that particular rule.

16 But I hope that we're all in agreement

17 here that there is no per se taking here because of

18 the absence of the crucial predicate of an interloper

19 with a government license. And the reason there's no

20 interloper with a government license is because once

21 the landlord opens up his property to a tenant, the

22 tenant becomes the invitee.

23 In fact, we would suggest to the Court how

24 we could easily turn this case into a per se taking.

25 If the rule were to not go to the rights of the